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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 355

BERNARD SUSSER, et al.,
Petitioners,

vs.

CARVEL CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC.

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BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC.

Statement

The respondent, H. P. Hood & Sons, Inc. ("Hood") is a supplier-defendant in six out of nine actions in which petitioners claim treble damages for alleged violations of the antitrust laws. The nine actions were tried by the District Court, without a jury, and the six complaints against Hood were dismissed (R. 43-71). Thereafter, the Court of Appeals unanimously affirmed the judgment dismissing the complaints against Hood (R. 431-458).

Hood is a Massachusetts corporation engaged in the manufacture and sale of quality dairy products. Peti-

tioners, plaintiffs in each of the six actions, are now or were the operators under franchise agreements of Carvel retail ice cream stores. In each of the stores, petitioners sold to the public Carvel Frozen Dairy Products, manufactured by petitioners, using as a basic component Carvel Special Formula Ice-Cream Mix processed by Hood for Carvel.

The actions were brought primarily against the Carvel Corporation and its corporate subsidiaries. But petitioners also joined, as defendants, certain independent companies, of whom Hood is one, which furnished supplies to the Carvel companies and delivered those supplies, on Carvel's instructions, directly to the Carvel retail stores. These peripheral defendants are sometimes referred to collectively as the "supplier defendants".

In addition to petitioners' claims based upon the antitrust laws, the complaints contained, originally, claims against the Carvel defendants *only*, alleging that petitioners had been induced by fraud on the part of Carvel to enter into the franchise agreements with Carvel. Those fraud claims were severed from the antitrust claims and were tried before the District Court, without a jury, in 1961. But Hood was never charged with any fraud and took no part in that trial. The District Court directed that the fraud claims against Carvel be dismissed.

Hood manufactures for and sells to the Carvel companies, under supply contracts between it and Carvel, a special type and kind of ice cream mix which is prepared according to a secret and confidential formula

or recipe originated by Carvel and furnished by Carvel to Hood. This mix is a perishable food product and is, therefore, delivered by Hood, on the instructions of Carvel, directly to certain Carvel retail ice cream stores in Massachusetts and Connecticut.

Such delivery by Hood is obviously necessary to avoid delays which would be incident to any direct delivery to Carvel and to the warehousing of this perishable product, and which would impair its quality with danger to the public health. Delivery direct to the retail stores also substantially decreases the expense of distribution and increases the speed and efficiency with which the Carvel frozen dairy products are made available to the consuming public.

The Sole Issue Relating to Hood

Petitioners initially alleged the existence of a widespread conspiracy between Carvel and the supplier defendants, including Hood, to subject the Carvel store operators to all of the allegedly onerous and illegal conditions of the Carvel franchise and related agreements. But petitioners subsequently limited, drastically, these far-flung charges with the consent of all other parties.

Thus Pretrial Order No. 5, entered on consent, provides in part (R. 148):

> "4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws."

With respect to the evidence to be offered by petitioners at the trial, the Pretrial Order continues:

> "5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) *written agreements between the Carvel defendants and the supplier defendants,* and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."* (Emphasis added) (R. 148, 450).

But none of the agreements between Carvel and the petitioners contains any mention of Hood. The only agreements which mention Hood are five Carvel-Hood supply contracts of which "Plaintiffs' Exhibit 10 is representative" (R. 252-262; 3186). The sole issue pertaining to Hood, therefore, is whether these supply contracts evidence practices or agreements which constitute *per se* violations of the antitrust laws.

To sustain *per se* violations of the antitrust laws against Hood, petitioners must establish that these supply contracts evidence one of those:

> "* * * agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed

* This testimony was given in an action for an injunction brought by Carvel against James Pierce, et al. in Pennsylvania. Hood was not a party to that action and has had no dealings with James Pierce.

All parties concede that the witness described as "Mr. Bittner" in the pretrial order was, in fact, a Mr. Ray Althouse, a truckdriver for Rakestraw, a defendant in actions to which Hood is not a party.

to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5.

The Carvel-Hood supply contracts evidence no such agreements or practices.

Hood Not Charged as a Participant in a Common Conspiracy

Nothing contained in any of the agreements or documents or in any of the testimony proffered by petitioners establishes, or even suggests, that Hood participated in any way in the negotations for, or in the preparation and execution of, any agreement of any kind, relating to Carvel or the petitioners, other than the Carvel-Hood supply contracts. Nor is there any evidence that Hood had any knowledge of any franchise or other agreement between Carvel and any of the Carvel store operators or of any agreement between Carvel and any other supplier, prior to the commencement of these actions.

Indeed, petitioners expressly declared that they do not charge that Hood and the supplier respondents engaged in any general or common conspiracy with Carvel and with each other in furtherance of violations of antitrust law. The alleged liability of Hood and the other supplier respondents is predicated upon the theory of separate unlawful conspiracies on the part of Hood and *each* of the supplier respondents *with Carvel* not to sell direct to the petitioners.

Thus counsel for petitioners conceded at a pretrial hearing that there was no "combination between the supplier defendants", no "sort of round-robin with all of them participating"; and asserted that petitioners only charged that "Carvel was violating the antitrust laws by a series of agreements going out to each of the supplier defendants individually" (R. 149).

Conformably the District Court stated in its opinion (R. 51):

> "The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

In the light of the foregoing sharp limitation of the issues no weight whatsoever should now be accorded to petitioners' subtle intimations: that there was a broad "concert of action of the suppliers"; a "program of concerted action" between Carvel and the suppliers; and a "Carvel supplier entente" constituting a "combination and conspiracy" (Pets. Br. p. 51).

Nor should the Court be misled by petitioners' confusing references to the statements in an affidavit of Martin Cain, Sales Manager of Eagle Cone Corporation, one of the supplier defendants, which petitioners apparently would impute, inferentially, in some meas-

ure, to Hood (Pets. Br. 48-53). For Martin Cain had no dealings with Hood and its representatives. And whatever transactions Cain and Eagle Cone may have had with Carvel and whatever Cain says about them they have no pertinence to Hood and do not bind Hood.

Similarly, none of the testimony of Vettel, general manager of the Carvel companies, has any bearing upon Hood's situation (Pets. Br. 50; R. 32). Hood's case rests upon its own separate and distinctive factual basis.

Summary of Argument

I

Hood's evidence establishes conclusively that it was not a participant in a common conspiracy or concert of action to violate the antitrust laws, involving Carvel and the supplier defendants—if such ever existed. Hood's situation as a respondent presents separate and clearly defined questions, and its position is irrefutably supported by stipulated facts and by the uncontradicted testimony of its witness, Walter Simonsen (R. 177-196).

Established are the facts that Hood had: no knowledge of Carvel's franchise agreements or other contracts with its store operators; no knowledge of the Carvel Standard Operating Procedure Manual; had nothing to do with the method or manner of operating the stores; did not determine or participate in determining the price or conditions of sale pursuant to which Carvel sold its Ice-Cream Mix to the store operators; and did not determine or participate in determining

the prices for which Carvel Frozen Dairy Products, made with Carvel Ice-Cream Mix as a component, were sold to the public.

II

The Carvel Ice-Cream Mix manufactured by Hood and sold *only* to Carvel was made in accordance with Carvel's special secret formula furnished to Hood by Carvel, which Hood agreed not to disclose to any unauthorized person. And Carvel supplied Hood with the stabilizer and emulsifier which Hood uses in preparing the mix.

Carvel had a perfect legal right to contract with Hood for the manufacture exclusively for Carvel of its Carvel Ice-Cream Mix in accordance with the recipe and specifications which Carvel furnished. And petitioners had no right, as the District Court held, to purchase this Carvel Mix from Hood "made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed." Similarly, the Court of Appeals soundly held: "Carvel enjoyed the right to sell it [the mix] to whomever it chose, . . . Carvel was free to insist that Hood . . . produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition." (R. 449)

But close examination of petitioners' brief does not disclose a single mention or recognition: that Hood made Carvel ice cream mix under Carvel's special secret formula; that Carvel furnished Hood with the stabilizer and emulsifier; and that Carvel systematically inspected Hood's manufacture to insure high quality and sanitary handling (*Infra* 15-16). Certainly, this glaring fail-

ure is an implied admission of the extreme vulnerability of petitioners' case against Hood.

III

There is no merit to petitioners' claim based on the agreement by Hood not to sell non-Carvel mix or non-Carvel products to the store operators. For as both the Court of Appeals and the District Court expressly held: Carvel cannot be considered in competition with Hood or any of the suppliers, and such agreement not to deal—even if established—would not constitute an illegal boycott. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956) *cert. denied*, 355 U. S. 823 (1957) (R. 53).

Moreover, both the Court of Appeals and the District Court further found: that petitioners had failed to prove that they had asked Hood or any supplier defendant to make sales of ice-cream mix or of ice-cream products or of any merchandise not approved by Carvel, and that Hood or any supplier had refused to do so; and also that petitioners had made no showing that they could not obtain non-Carvel ice-cream mix, ice-cream products or other merchandise from other suppliers; or that the refusal of Hood or of any other supplier to sell petitioners deprived them of access to such merchandise, that is, foreclosed alternate sources of supply (R. 53-54; 449).

Further, Carvel's supply contracts with Hood were soundly in the public interest. And for Hood to breach

its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public. Any misrepresentation of food products, particularly highly perishable products, such as frozen dairy products, is a matter of vital public concern.

If Hood were to deliver an ice-cream mix other than the Carvel Mix, to Carvel stores and if the ice-cream products made therefrom were to be sold under the Carvel name, such conduct, as will be shown, could subject both Hood and the store operators to liability under Massachusetts and Connecticut statutes.

IV

The Carvel-Hood supply contracts are partial requirements contracts under which Carvel agrees to purchase from Hood all its ice-cream mix requirements for Connecticut and Massachusetts. These contracts provide, however, that either party may cancel the agreements on ten days' notice. Thus the requirements provision binds Carvel to purchase ice-cream mix from Hood, in the specified area, for only a 10-day period. Clearly, this provision does not constitute a *per se* violation or any violation of the anti-trust laws and is, in all respects, proper and legal. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

The Court should not be misled into the erroneous conclusion that Hood did a considerable volume of business with Carvel, by petitioners' statements: that Carvel had about 400 franchise stores located in nine or ten states; that Carvel sold to its dealers more than 2,000,000 gallons of mix annually; and that sales of

mix alone—apart from sales of other ingredients, supplies and equipment—were $2,611,324 in 1960 (Pets. Br. 4, 6, 28).

In fact the total volume of business which Hood did with Carvel was small. For the Carvel-Hood supply contracts were only partial requirements contracts. They provided for delivery by Hood of ice cream mix, not to 400 Carvel stores in nine or ten states, but only to stores located in two states, Massachusetts and Connecticut (Ex. 10; R. 252-262; 3186; 253,179).

V

Hood's proof overwhelmingly establishes that the Carvel-Hood contracts and the practices of Hood under them have many patent and necessary virtues and require no redemptive justification. They are affirmatively reasonable and proper for the protection of the legitimate proprietary interests of both Carvel and the store operators themselves. Further, they protect the vital interests of the consuming public. Lacking is any proof by petitioners that they have any adverse effect upon competition—much less a "pernicious" effect.

ARGUMENT

POINT ONE

Hood did not participate in any illegal conspiratorial boycott with respect to direct sales to petitioners or engage in any other violations of the antitrust laws.

I

The economic and social aspects and benefits of the franchise system.

The District Court, in its opinion, clearly delineated the nature of the franchise system and Carvel's

operations as part of it. Thus the Court, among other things, pointed out:

The operation of franchised stores, of which Carvel is an example, is a comparatively recent development. These stores differ from the older established chain store operations in which the managers of the stores are not independent operators. For the franchise operators conduct their businesses as independent contractors although they are subjected to a number of restrictions which tend to create a uniform system of operation. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of product of uniform quality (R. 49-50).

The Court soundly observed further: that the franchise system has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs; that it creates a class of independent businessmen; that it has had a phenomenal growth particularly in the ice cream industry; and that it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors rather than from employees of a chain. If our economy had not developed the franchise system of operation these individuals would have turned out to be merely employees. The system of operation is, therefore, good for the economy (R. 49-50).

Continuing its delineation the trial court also stated; that the cornerstone of a franchise system

must be the trademark or trade name of a product; and that it is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for their products. This uniformity of stores, of operation and of advertising, and the knowledge of the public of the uniformity and quality of the product is what draws business to the Carvel operators (R. 49-50).

Moreover, the name "Carvel" constitutes, the Court found, a trademark of great value to the defendant companies and to the franchise operators. And it is well established, the Court soundly held, that without abandoning its trademark the owner may license its use to another, but must nevertheless continue its supervisory control. The validity of the franchise agreements and the other agreements between Carvel and the operators must be judged, the Court concluded, in the light of this fundamental rule relating to the protection of trademarks and trade names (R. 50-51).

II

The five Carvel-Hood supply contracts are not illegal *per se* or otherwise.

In 1953 Carvel, which had been developing its chain outlet ice-cream business since about 1934, established Carvel retail stores in the states of Massachusetts and Connecticut. Hood was a well known supplier of quality dairy products in the areas in these states in which the Carvel stores were to be located. Carvel engaged Hood to process for Carvel all of its requirements of a special type and kind of ice-cream mix to be made according to Carvel's special recipe or formula

and to deliver this mix to the Carvel retail stores to be located in Massachusetts and Connecticut.

Accordingly, Hood entered into a supply contract on May 21, 1953 with *Carvel Dari-Freeze Stores, Inc.*, a New York corporation. Subsequent contracts between these parties were entered into January 2, 1954, March 14, 1955 and May 14, 1956.

Hood also entered into a contract with *Carvel Stores of New York, Inc.*, also a New York corporation, on May 14, 1956 (Ex. 10; R. 252-262; 3186). Hood's 1956 contract with Carvel Stores of New York, Inc., is substantially identical in its terms with Hood's May 14, 1956 contract with Carvel Dari-Freeze Stores, Inc.

Both of the May 14, 1956 contracts expired by their terms on May 15, 1957. But the parties thereto have been conducting business pursuant to the terms of those contracts since that date.

The basic provisions here pertinent, which are incorporated in all of the contracts between Hood and Carvel, provide: that Carvel shall furnish Hood with a certain secret and confidential mix formula; that Hood shall manufacture this mix in strict compliance with the formula; that Hood shall sell this mix only to Carvel; and that Hood shall not reveal without Carvel's authorization the contents of the secret formula to any other person.

The successive contracts contain detailed statements with respect to the implementation of these basic provisions. The most detailed statement setting forth the relationship between Hood and Carvel is contained

in the two May 14, 1956 contracts. There is no significant provision in any of the earlier contracts which is not found in these 1956 contracts (Ex. 10; R. 252-263; 177; 3186).

A summary of the material provisions of the two 1956 contracts follows:

1. Hood agrees to manufacture for and sell to Carvel all the Carvel Mix required by Carvel dealers located in the geographic area to be serviced by Hood. Carvel agrees to purchase from Hood all its requirements of Carvel Mix for such stores (para. 1; R. 253).

2. Hood shall manufacture the Carvel Mix according to the secret mix formula furnished to it by Carvel. Hood agrees not to disclose the formula to any unauthorized persons (para. 2; R. 253).

3. The highest quality ingredients shall be used and the mix shall have at least 10% butterfat content (paras. 3(b), 3(c); R. 253-254).

4. Hood shall prepare the mix in batches and shall submit batch reports to Carvel within 24 hours after each batch is prepared (para. 3(e); R. 254).

5. The mix shall be packed in sanitary 10-gallon cans, properly wired and sealed, with tags in the form specified by Carvel attached to each can (paras. 4(a), 4(b); R. 254).

6. Hood may receive orders for mix directly from the Carvel dealers and deliver the mix directly to the dealers in trucks operated by Hood (para. 5(a); R. 254).

Hood agrees to deliver only Carvel Mix to Carvel stores and no other mix or ice-cream preparation (para. 5(f); R. 255).

7. Hood agrees to prepare the Carvel invoices for each delivery of mix to the Carvel stores on invoice forms supplied by Carvel at prices fixed by Carvel (para. 6; R. 255).

8. Hood also agrees to make collections from the store operators of the amounts due Carvel for the mix delivered; to collect, on the request of Carvel, all royalties due to Carvel from Carvel stores; and to deposit the collections in the Carvel bank account (paras. 7(a), 7(c) and 7(d); R-255-256).

9. Hood agrees that it will deliver on a C.O.D. basis when requested by Carvel to do so (para. 7(b); R. 256).

10. Each week Hood is to bill Carvel for shipments made during the prior week. The price to be paid by Carvel to Hood shall equal the cost of the ingredients plus 17½% thereof to cover Hood's labor, overhead and profit. Hood is also to receive 50¢ per 10-gallon can as consideration for delivering the mix directly to the stores, billing, collections of payments, etc. (paras. 8(a), 8(b), 8(c) and 8(d); R. 256-257).

11. Carvel retains the right to inspect Hood's plant and to return any mix delivered in unsanitary cans or which does not conform with Carvel's special formula (paras. 10, 11; R. 259).

12. Hood agrees "that it will not manufacture, or represent that it can or will manufacture, the Carvel Mix for sale to any person, firm or corporation other than Carvel or its designated Carvel Stores" (para. 12; R-259-260).

These provisions evidence no illegal agreement or practice by Hood.

III

The following facts were established without contradiction by stipulations entered into between Hood, the petitioners and Carvel (R. 177-180), by the uncontroverted testimony of Hood's witness, Walter Simonsen (R. 180-196), or by both.

Numerous stipulations as to conceded facts were entered into between Hood and the petitioners and were read into the record at the trial (R. 177-180). Carvel joined in those stipulations (R. 179).

Moreover, Walter Simonsen testified on behalf of Hood and was cross-examined both by petitioners and by Carvel (R. 180-196).* Mr. Simonsen has been Hood's sales manager for its ice-cream mix sales division for almost 17 years and has been engaged in the ice-cream business for approximately 25 years (W. S., R. 180). He has sole supervision of the business relations and contacts between Hood and Carvel and also acts in an advisory capacity with respect to the manufacture of Carvel Mix (W. S., R. 180-181). Mr. Simonsen is thoroughly familiar with Carvel's special formula for its mix (W. S., R. 194).

The following facts were established beyond question by the evidence so adduced:

Hood was not a party to and had no knowledge of Carvel's franchise agreements or other contracts with its store operators.

Hood did not participate in any way in the negotiations for, or in the preparation or execution of, any of the franchise agreements between the petitioners and

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* The testimony of Mr. Simonsen will be indicated by his initials, *W. S.*

Carvel or any of such other documents as may have been signed or exchanged by or between Carvel and any of the petitioners at the time of or in connection with the execution of the respective franchise agreements (Stip., R. 178; W. S., R. 184).

Hood had no knowledge of any of the franchise agreements between Carvel and the operators of Carvel stores, or of any of the provisions contained therein, prior to the commencement of these actions (W. S., R. 184).

Hood had no knowledge of any of the documents signed by or exchanged between Carvel and the operators of Carvel stores at the time of or in connection with the execution of the franchise agreements between Carvel and the operators of Carvel stores prior to the commencement of these actions (W. S., R. 184).

Hood never saw and had no knowledge of the Carvel Standard Operating Procedure Manual and nothing whatsoever to do with the manner in which the Carvel stores were operated.

The petitioners received from Carvel a copy of the Carvel Standard Operating Procedure Manual, referred to as the "S.O.P. Manual" (Stip., R. 178).

Hood did not participate in any way in the preparation or distribution of the Carvel S.O.P. Manual or of any addition or supplement thereto (W. S., R. 185).

Hood had no knowledge of the Carvel S.O.P. Manual, or of any addition or supplement thereto, or of any of the provisions contained therein, prior to the commencement of these actions (W. S., R. 185).

None of Hood's officers or employees gave any instructions to any of the petitioners relating to the operation of the Carvel stores (W. S., R. 185).

The operators of Carvel stores are required under the laws of the State of Connecticut and the Commonwealth of Massachusetts to obtain manufacturers' licenses (Stip., R. 179).

A special Carvel tag and a distinctive Carvel seal were affixed to each can of Carvel Mix delivered by Hood to the Carvel stores (Hood Ex. 4; R. 325; 175; 3553; W. S., R. 183-184).

The Carvel Mix manufactured by Hood for Carvel is processed according to Carvel's secret special formula and differs from all other ice-cream mixes manufactured by Hood.

Carvel Mix is manufactured by Hood in batches separate from any other mix (W. S., R. 182).

A batch report containing a list of ingredients and a laboratory test of the product is sent to Carvel by Hood with respect to each batch of Carvel Mix manufactured by Hood (W. S., R. 181-182).

Carvel Mix is manufactured by Hood according to a secret special formula furnished by Carvel which differs from all formulae used by Hood in the preparation of other than Carvel Mix (W. S., R. 182, 190-191).

Carvel supplies Hood with the stabilizer and emulsifier which Hood uses in the preparation of Carvel Mix (W. S., R. 181, 194-196).

Hood did not participate in the determination of the prices at which Carvel sold its ice-cream mix to the store operators or in the determination of any of the other conditions of sale.

Carvel notified the operators of the Carvel stores of the prices the operators were to pay Carvel for Carvel Mix (Hood Ex. 1, R. 320, 174; 3550; Stip., R. 179).

Carvel then notified Hood of such changes in the price at which Carvel Mix, to be delivered by Hood, would be sold by Carvel to the operators of Carvel stores (W. S., R. 186).

Carvel alone determined the conditions under which it would grant the operators of Carvel stores a discount on purchases of Carvel Mix and fixed the amount of such discount (W. S., R. 186).

Carvel alone determined when a store was to be placed on a C.O.D. basis in connection with purchases of Carvel Mix from Carvel and notified the operator of the Carvel store of Carvel's determination by sending a written C.O.D. notice to him (Hood Ex. 2, R. 321-323; 3550; W. S., R. 174-175; 186-187).

Carvel then notified Hood that a Carvel store to which Hood delivered mix had been placed on a C.O.D. basis by sending to Hood a copy of the C.O.D. notice sent by Carvel to the operator of that Carvel store, with Carvel's instructions to Hood, if any, regarding the allowance of a discount and the manner of collecting the royalties payable by the operator of the Carvel store to Carvel (Hood Ex. 2, R. 321-323; 3550; 174-175; W. S., R. 186-187).

Carvel notified Hood that a Carvel store to which Hood delivered mix had been removed from a C.O.D.

basis by sending to Hood a copy of the notice of removal from C.O.D. sent by Carvel to the operator of the Carvel store (Hood Ex. 3, R. 324, 174-175; 3553; W. S., R. 187-188).

Carvel alone determined the form of the Carvel invoices to be presented to the operators of Carvel stores with each delivery of Carvel Mix (Hood Exs. 5, 6, 7, R. 326-328; 175-177; 3554-3556; W. S., R. 188).

The original Carvel invoice was delivered by Hood to the operator of the Carvel store (W. S., R. 189).

A copy of each Carvel invoice was sent by Hood to Carvel (W. S., R. 189).

Hood has never participated in any way in the determination of the prices charged by Carvel to the operators of Carvel stores for Carvel Mix (W. S., R. 185).

The operators of the Carvel stores acknowledged receipt of the merchandise mentioned in each invoice by signing the delivery receipt at the bottom of each Carvel invoice (W. S., R. 189).

The amounts collected by Hood from the store operators on Carvel invoices were deposited by Hood in Carvel's bank account (W. S., R. 189).

Hood did not participate in the determination of the prices at which Carvel Frozen Dairy Products, made with Carvel Ice-Cream Mix as a component, were sold to the public.

In preparing products to be sold to the public, the operators of Carvel stores are required to perform the following operations, among others, with respect to the

Carvel Ice-Cream Mix delivered to them (Stip., R. 178-179; W. S., R. 189-192):

(1) The mix is flavored and other ingredients, such as fruits, nuts, candies, cereals, etc., are added as needed.

(2) The mix is processed in a Carvel Mix machine to obtain soft ice-cream.

(3) To obtain hard ice-cream, the soft ice-cream is subsequently frozen in a separate freezer.

(4) The soft or hard ice-cream so manufactured is shaped, decorated, garnished with syrups, fruits, nuts, marshmallow, and other toppings and then packaged, as may be required, to make the various products described in the Carvel S.O.P. Manual.

The Carvel stores do not sell ice-cream mix to the public in the form in which it is delivered to the stores (W. S., R. 189).

Hood has never participated in any way in the determination of the prices charged to the public by the operators of Carvel stores for frozen dairy products sold at Carvel stores (W. S., R. 193).

POINT TWO

Carvel's requirement that Hood deliver no ice-cream mix or ice-cream preparation other than Carvel Mix to the Carvel stores is necessary and proper to protect both Carvel and the consuming public and is in no sense illegal.

The 1956 Carvel-Hood supply contracts provided that Hood will deliver no ice-cream mix or ice-cream

preparation other than Carvel Mix to Carvel stores (para. 5(f); R. 255).* There are cogent reasons for those provisions, among them the necessity to protect the public against possible fraudulent imposition.

All Carvel stores display a large exterior sign bearing the name "CARVEL" and in most instances a replica of a Carvel ice-cream cone. Moreover, the name "CARVEL" appears on much of the equipment contained within the stores and is imprinted upon the menus, bulletins, placards, and advertisements placed in and about the stores. Thus, the name "CARVEL" has come to be identified indelibly in the public mind only with quality ice-cream products sponsored by Carvel and sold in Carvel stores (R. 49-50).

The public has a right to expect, and undoubtedly does expect, that Carvel stands behind the products which are sold at these stores, and that it exercises proper control to insure that these products conform to high standards of taste, quality and healthfulness.

Moreover, each store operator benefits from the continued high reputation of Carvel. For customers who have no knowledge of the particular store or of its franchised operators will, nevertheless, stop and make purchases because of the Carvel reputation (R. 50).

In order to insure that all products sold at Carvel stores will conform to Carvel's high standards and fulfill the public expectations which Carvel has created,

* All references to Carvel-Hood contract paragraph numbers refer to the May 14, 1956 contracts (Ex. 10; R. 252-263).

Carvel itself must control the supply of ice-cream mix to the stores. Therefore, although the mix is processed by Hood for certain Carvel stores in Connecticut and Massachusetts, Hood is required to follow the special and confidential formula originated and supplied to it by Carvel (para. 2, R. 253).

Moreover, Carvel also requires that Carvel Mix be prepared in batches separately from any other mix, and that a batch report be mailed to Carvel by Hood within 24 hours after the preparation of each batch of mix (para. 3(e), R. 254) and Carvel retains the right to inspect Hood's plant, distributing depots and all materials, machines and equipment used in the manufacture of the Carvel Mix (para. 10, R. 259).

Further, in order to insure that the store operators will use only Carvel Mix and not some other mix prepared according to different or varying standards, Carvel has contracted with Hood that Hood will deliver only Carvel Mix and no other ice-cream mix or ice-cream preparation to Carvel stores (para. 5(f), R. 255).

Thus, it is readily seen that this requirement is soundly in the public interest. For Hood to breach its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public.

Any misrepresentation of food products, particularly of highly perishable products such as frozen dairy products, is a matter of vital public concern. The public must rely on the integrity of the organiza-

tion under whose name and sponsorship a food product is sold, for protection from inferior, unsavory, and possibly unhealthful products. That this is so is confirmed by the following provision which appears in Section 19-202 of Chapter 341 of the General Statutes of Connecticut:

> "* * * No person, shall sell, offer for sale or advertise for sale any frozen dessert or frozen dessert mix if the brand name of the frozen dessert or frozen dessert mix or the label upon it or the advertising accompanying it gives a false indication of the origin, character, composition or place of manufacture, or is otherwise false or misleading in any particular. * * *" (R. 332)

Substantially identical language appears in Section 65L (b) of Chapter 94, Title XV of the General Laws of Massachusetts (R. 330).

If Hood were to deliver an ice-cream mix other than the Carvel Mix, to Carvel stores and, if such mix were to be placed in Carvel Mix machines and the products made therefrom sold to the public under the Carvel name, such conduct could subject both Hood and the store operators to liability under Massachusetts and Connecticut statutes.

Clearly the requirement that Hood deliver no ice-cream preparation other than Carvel Mix to the Carvel stores is not "pernicious" in any sense and, on the contrary, possesses affirmative virtues. It merely would prohibit a practice which would be so clearly in violation of the public interest that it could not possibly be justified on any theory.

POINT THREE

The provision that Hood manufacture Carvel Mix exclusively for Carvel, in accordance with Carvel's special secret formula, in which Carvel has a proprietary interest, is also patently proper.

The 1956 Carvel-Hood contracts provide that Hood shall manufacture a particular type of ice-cream mix exclusively for Carvel, according to specifications provided by Carvel (paras. 1, 2, R. 253).

The lack of authority for a contention that this type of arrangement constitutes *per se* violation of the antitrust laws is indicated by the terms of a consent decree entered in *United States* v. *Ekco Products,* 1957 CCH Trade Cases, para. 68,768 (N. D. Cal., 1957), which provides, among other things:

> "Nothing in this Section VIII shall be deemed to prevent defendants from contracting for the manufacture *exclusively for them* of specific silicone compounds in accordance with the formulas and specifications furnished by defendants." (Emphasis supplied; p. 73,129).

Certainly the Justice Department would not have consented to a decree which specifically permitted a practice which might, on any theory, be considered a *per se* violation of the antitrust laws.

The legality of the exclusive arrangement here involved is further clear from *Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied,* 355 U. S. 822.

In the *Packard Motor* case, Zell Motor Car Company, the largest of three Baltimore Packard dealers,

told Packard that Zell was losing money and would give up its dealership unless Packard gave it an exclusive contract. Packard agreed that it would do so and told the plaintiff, Webster, and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit Packard offered Webster the usual one-year renewal but refused to promise more. Packard agreed with Zell that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, brought suit and was awarded damages.

The District Court held that the jury on the facts there presented "had a right to reach the conclusion" that the agreement was unreasonable.

But on appeal, the Circuit Court reversed the decision below and granted judgment in favor of Packard. Judge Edgerton discussed the question arising under Section 1 of the Sherman Act as follows (pp. 420-421):

> "* * * When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case. . . . The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement."

In the *Packard* case the elimination of competition was the immediate object and direct result of the exclusive arrangement. Zell, which sought the exclusive

dealership, actually asked Packard to eliminate the plaintiff, Webster, as a competitor in the Baltimore area, and its request was granted. Nevertheless, the Circuit Court held that the exclusive dealership was not only legal, but *per se* legal. Here, the exclusive arrangement between Hood and Carvel did not so eliminate competition, actual or potential, and possesses none of the characteristics which might even raise a serious question of illegality.

Other authorities which unmistakably indicate the legality of the Carvel-Hood supply contracts include: *Bascom Launder Corp.* v. *Telecoin Corporation*, 204 F. 2d 331 (2d Cir. 1953), *cert. denied*, 345 U. S. 994, and *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944).

In *Bascom Launder*, this Court ruled that in view of the controlling authority of the *Bausch & Lomb* case, the District Court's charge to the jury that an exclusive sales agreement, similar to Hood's arrangement with Carvel, was a *per se* violation of the Sherman Act constituted reversible error.

Discussing the exclusive arrangement involved in the *Bausch & Lomb* case, in his opinion in *Bascom Launder*, Judge Frank commented as follows (p. 335):

> "There a manufacturer agreed to sell one of its products to no one other than a single distributor. Judge Rifkind—* * * said, [45 F. Supp. 398] that the Sherman Act was not violated, because the manufacturer had no monoply of the product, and the 'restraint of trade' was (a) ancillary to *a reasonable main purpose*—a source of supply to the

distributor—and (b) fairly protective of that distributor's interests but not so large as to interfere with the interests of the public." (Emphasis supplied)

Judge Frank then went on to state that in view of the controlling authority of *Bausch & Lomb*:

"The contract in the instant case [Bascom] was therefore not unlawful in and of itself. The plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was *without a reasonable economic basis and merely served as an instrument for unduly restraining trade. . . .*" 204 F. 2d at p. 335 (Emphasis supplied)

The exclusive arrangement here under examination does not fall within any of the prohibitions set forth by Judge Rifkind and by Judge Frank. The reasonable purposes and economic bases of the Carvel-Hood arrangement are, we submit, beyond question. And there is no contention that Hood had a monopoly of any product. As to this the District Court commented:

"Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods." (R. 53-54)

Carvel, in order to protect its own interests, the interests of its store operators, and the interests of the consuming public, had to assure itself of a dependable and efficient source of supply of its own special formula

ice-cream mix, containing only the highest quality ingredients. These reasonable and beneficent results Carvel achieved by: (1) closely supervising the manufacturing process; (2) by requiring that Hood use a stabilizer and emulsifier which was supplied by Carvel; and (3) by providing that Hood was to sell Carvel Mix only to Carvel and that Carvel might return to Hood any mix, packed in unsanitary containers or not conforming to Carvel's special formula.

POINT FOUR

The provision that Carvel purchase all of its requirements for Carvel Mix, in a specified area, from Hood is in all respects reasonable and proper, and could not possibly constitute a violation of the Antitrust Laws.

The 1956 Carvel-Hood supply contracts are partial requirements contracts. They provide that Carvel will purchase from Hood all its requirements of Carvel Mix in a specified area, Connecticut and Massachusetts. Obviously the volume of business which Hood does with Carvel is small, as we have shown (*supra* 10-11). This provision of the contract does not constitute a *per se* violation or any violation of the antitrust laws.

The fact that requirements contracts are not *per se* illegal was made irresistibly clear by the decision of the United States Supreme Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

The clear holding of the *Tampa* case is that exclusive dealing arrangements of the type here involved are not *per se* illegal and will not be found to be illegal

under either Section 3 of the Clayton Act or Sections 1 and 2 of the Sherman Act, unless:

> "* * * the court believes it probable that the performance of the contract will foreclose competition in a substantial share of the line of commerce affected." 365 U. S. at p. 327

The contract under attack in the *Tampa* case provided that the seller, Nashville Coal Co., would sell and the buyer, Tampa Electric Co., would purchase for a *twenty-year period* all of Tampa's coal requirements to be used in a new power station. The anticipated maximum requirements amounted to 2,250,000 tons of coal annually or more than three times the total annual consumption of coal in peninsular Florida as of 1958 (excluding the new power station). The maximum price was $8.80 per ton.

Thus, competition in $19,800,000 worth of coal per year might be foreclosed by the terms of the contract. The anticipated maximum yearly tonnage to be delivered under the contract was found to approximate 18% of the total market for coal of the same type in the States of Georgia and Florida. And that yearly tonnage approximated 1% of the total market production of all producers in the whole Appalachian coal area, which market involved "an annual trade in excess of 250,000,000 tons of coal and over a billion dollars" (p. 334).

Yet in upholding the validity of this rather extraordinary contract, so much more drastic in its terms and effect than that here involved, Mr. Justice Clark stated (p. 334):

> "The 20-year period of the contract is singled out as the principal vice, but at least in the case of

public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest."

In marked contrast to the twenty-year term of the contract in the *Tampa* case, the May 14, 1956 contracts between Hood and Carvel provide that *either* party may cancel the agreement on 10 days' notice (para. 13(a), R. 260).* Thus if some competitor of Hood should offer Carvel more favorable terms Carvel would be free to accept the offer on 10 days' notice to Hood. In effect, the requirements provision binds Carvel to purchase its requirements in the specified area for only a 10-day period. Clearly this provision is in all respects proper and legal.

POINT FIVE

Both the Court of Appeals and the District Court unanimously held that the Carvel-Hood supply contracts involved neither *per se* violations nor indeed any violations of the antitrust laws.

As we have shown (*supra,* 4-5) only those agreements or practices have been held to be *per se* violations of the antitrust laws, which experience has shown: (1) to be so "pernicious" in their effect on competition; and (2) so lacking in "any redeeming virtue"; that (3) their unreasonableness and consequent illegality is conclusively presumed;—without the necessity for any further inquiry or for any consideration of any business excuse or justification for their use.

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*The March 14, 1955 contract contains the same 10-day cancellation provision; the May 21, 1953 and January 2, 1954 contracts were terminable at will by either party.

Clearly, neither the Carvel-Hood supply contracts nor any of Hood's conduct pursuant to them fall in that category. On the contrary, the proof *affirmatively* establishes: that these contracts have many patent virtues and require no redemptive justification; and that they are all reasonable and proper for the protection of the legitimate proprietary interests both of Carvel and of the store operators themselves—as well as the interests of the consuming public. And there is no proof whatsoever that the contracts have any adverse effect upon competition, much less a "pernicious" effect.

We have found no cases which deal with contracts of the precise type here under examination. Certainly petitioners have produced no authority for the contention that these contracts or any of the conduct of Hood constitute *per se* violations or, indeed, any violations of the antitrust laws. We submit that the highly pertinent authorities which we do cite lead irresistibly to the conclusion that these contracts are entirely proper and legal.

The Opinion of the District Court.

Sustaining the legality of the Carvel-Hood supply contracts the District Court said (R. 52):

> "It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel, . . . the plaintiffs failed to prove that such provisions were in fact illegal. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).
>
> As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Car-

vel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious."

With respect to petitioners' alleged second possible basis for liability the District Court further said (R. 53):

"As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix . . . or other than Carvel approved merchandise . . . As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores . . ."

The Court then found that petitioners' argument that the provisions of the supply contracts are illegal must fail for several reasons and pointed out, among other things: that petitioners had failed to prove that they had asked any of the supplier defendants to make sales of unapproved merchandise and that they refused to do so; and that the petitioners had made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived them of any access to these goods. In conclusion the Court stated:

". . . plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defend-

ants and the case against them must therefore be dismissed" (R. 54).

The Unanimous Opinion of the Court of Appeals as to Hood.

The Court of Appeals unanimously affirmed, in all respects, the foregoing views of the District Court. As to the agreement that Hood would produce ice cream mix under Carvel's secret formula which Hood pledged itself not to divulge, Chief Judge Lumbard, speaking for the Court of Appeals, said (R. 449):

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition."

As to the agreement by Hood not to sell non-Carvel products to the store operators, the Court of Appeals further said (R. 449):

> "As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the suppliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such

an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

The District Court had similarly held that even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators such agreement by two persons not in competition with each other would not have constituted an illegal boycott, citing: *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957). (R. 53)

CONCLUSION

Petitioners have been operating their stores under franchise agreements into which they willingly entered. They chose to do business under Carvel's name, insignia and reputation and to hold out to the public that they dispensed only Carvel Frozen Dairy Products. Now, apparently, they find that their agreements involved duties, as well as rights, and that their profits are not those for which they had hoped. They have brought these actions and have made defendants of all who, by the widest stretch of imagination, might be thought to have contributed to their disappointment.

Patently Hood was made a party defendant solely because of petitioners' determination to catch within an alleged conspiracy dragnet all who might conceivably have any connection with Carvel. But Hood's situation presents separate and clearly defined questions, and its position is irrefutably supported by stipulated facts and by Simonsen's uncontradicted testimony. As both the Courts below unanimously held, there is, as a matter of fact and law, no merit in petitioners' claims against Hood.

The judgments of the Court of Appeals for the Second Circuit which affirmed the dismissal of the complaints as against the respondent, H. P. Hood & Sons, Inc. should be affirmed.

Dated: New York, N. Y.
February 15, 1965

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